Deloitte Corporate Advisory Services Sdn Bhd v Lim Tham Cheng & Ors

HIGH COURT (PENANG) — CIVIL SUIT NO PA-22NCVC-230–11 OF 2019
KENNETH ST JAMES JC
23 SEPTEMBER 2024

Contract — Agreement — Breach — Majority shareholders in company wanted to sell majority stake in company — Majority shareholders engaged consultant/advisor to advise, find buyer and facilitate transaction — Consultant/advisor to be paid milestone and success fees in consideration of work and services — Whether entitled to success fee even if transaction terminated or delayed but ultimately completed within reasonable timeframe — Whether termination of negotiations rendered consultancy/advisory agreement to be lapsed or terminated — Whether consultancy/advisory agreement automatically lapsed if agreement failed to specify duration or termination clause — Whether consultant or advisor entitled to agreed-upon success fee although they did not directly participate in final stages of transaction — Whether initial efforts and contributions leading completion of transaction ought to be taken into account — Whether claim for success fee not void or unenforceable due to lack of consideration — Whether consultant or advisor provided valuable services and met their obligations under consultancy/advisory agreement considered as consideration

The defendants were the majority shareholders in their company, Alpha Precision Turning and Engineering Sdn Bhd ('Alpha'). They wanted to sell their majority stake in Alpha ('transaction'). Therefore, they engaged the plaintiff to advise them and to find them a buyer. The contract between the plaintiff and the defendants was the engagement letter. In consideration of the plaintiff's work and services, the plaintiff was to be paid milestone fees (which did not depend on the completion of the transaction) and a success fee (which was dependent on the completion of the transaction). In August 2016, the plaintiff approached Platinum Equity International Advisors Pte Ltd ('PE') to buy the defendants' shares. From August 2016 until December 2018, the plaintiff worked on and provided services to complete the transaction. However, the negotiations with PE were terminated twice, once in November 2017 and then again in March 2018. But, in both instances, negotiations were revived and continued further culminating in a further revised final term sheet that the plaintiff worked on, and which was forwarded to PE to respond to. Up until May 2018, the plaintiff was, on the defendants' behalf, forwarding updated financial information on Alpha to PE, to complete the transaction. Then a year later in May 2019, the plaintiff discovered that the transaction was completed

A and the defendants had sold their majority shareholding in Alpha to Compart: the investor that PE, which the plaintiff and defendants intended (and knew) would be the ultimate buyer. The plaintiff then proceeded to claim for the success fee as contracted for in the engagement letter. The first defendant ('D1/Lim') settled with plaintiff and recorded a consent judgment to pay his portion of the plaintiff's claim. The second to fifth defendants, however, defended against the claim on the grounds that: (a) the engagement letter had 'lapsed', and the minimum success fee clause was 'irrelevant', since the success fee was contingent on the completion of the transaction; (b) the success fee formula had 'similarly lapsed' and was 'irrelevant' to the plaintiff's claim; (c) the success fee clause had 'no relevance or correlation to the value of the work or services rendered' by the plaintiff, as PE terminated the transaction for the second time in March 2018; (d) the plaintiff's invoice issued in September 2018 for the milestone fee amounting to RM203,520 was settled in full, and since then, no services have been rendered to 'justify the success fee'; (e) the revival of negotiations in December 2018 was on PE's initiative and not pursuant to the engagement letter nor PE's letter of intent issued in June 2017; (f) the engagement letter was in breach of 'professional and business ethics and practices', under the Accountants Act 1967 (Accountants Act), the By-Laws (On Professional Ethics, Conduct and Practice) of the Malaysian Institute Of Accountants ('MIA By-Laws'), or the Capital Markets And Services Act 2007 ('CMSA'). In other words, the terms of the engagement letter were illegal; and (g) the plaintiff's claim for a minimum success fee of RM2.915m (which includes a 6% service tax) was 'unconscionable and offended every conceivable legal, professional, business and ethical principle'. The issues that arose for determination were: (i) whether the disposal of the defendants' shareholdings in Alpha to Compart was consequential to the plaintiff's introduction and involvement; (ii) whether the plaintiff performed the scope of work set out in the engagement letter, which entitled the plaintiff to the success fee prescribed in the engagement letter; (iii) whether the plaintiff's claim for the success fee was unfair, unjust, unconscionable, void, unenforceable for want or failure of consideration, or prohibited or illegal under the Accountants Act and the MIA By-Laws, or the provisions of the CMSA.

Held, allowing the claim:

(1) The second till fifth defendants' defences in relation to the first issue, namely that disposal of the defendants' shareholding in Alpha to Compart was consequential to the plaintiff's introduction and involvement, were misplaced. The evidence disclosed that the plaintiff had performed work and rendered services to the defendants right up to preparing the further revised final term sheet in April 2018 and then giving to PE Alpha's updated financial data in May 2018. There was a pause in the negotiations for a few months, but then in November 2018, D1/Lim met again with PE and negotiations revived and continued.

This final round of negotiations led to the completion of the transaction by the signing of the share sale agreement ('SSA') between the defendants and Compart in May 2019. On the issue of second till fifth defendants' assertion that the engagement letter had lapsed, the engagement letter did not provide for it to lapse by an effluxion of time. In other words, the engagement letter did not automatically lapse after a specified period. Therefore, was untenable for D2-D5 to assert that the engagement letter had lapsed (see paras 62–65).

(2) Just as the engagement letter had not lapsed, the engagement letter was never terminated. The rights and obligations of the parties to the contract subsisted even beyond the plaintiff's issuance of its milestone fee invoice in September 2018. By paying the invoiced amount, the defendants in fact acknowledged their obligation under the engagement letter to pay the milestone fee under the engagement letter (see para 66).

(3) The eventual transaction captured by the SSA between the defendants and Compart was essentially the same transaction that was worked on and put together by the plaintiff. In other words, the transaction, as defined in the engagement letter, was completed. The defendants sold their majority shareholdings in Alpha, and Alpha transferred its real property to another company so that it could be leased back to Compart. This property-carve-out exercise was the plaintiff's idea and suggestion. Further, the eventual SSA transaction that was entered into was a direct result of the plaintiff's work and services. Therefore, the transaction was consequential to the plaintiff's introduction of PE to the defendants and their involvement in preparing and negotiating the terms of the transaction (see paras 67–70).

(4) On the argument of the second till fifth defendants that the success fee formula had lapsed, because the engagement letter had lapsed, the court found that the engagement letter had not lapsed, and the engagement letter was not terminated. Its terms subsisted. And the success fee formula was applicable to bind the defendants to it. The evidence disclosed that the plaintiff continued to perform work and render services to the defendants even after PE terminated negotiations for the second time in March 2018. Hence, the plaintiff had performed sufficient work and rendered sufficient services that led to ie, resulted in the completion of the transaction. In any event, the second till fifth defendants' argument was contrary to a reasonable interpretation of the success fee clause, including the 'other term', because the success fee term provided that the plaintiff was entitled to the success fee even if the plaintiff did not continue to work with the defendants to a successful completion of the transaction, as long as the ultimate completion of the transaction took place within 24 months of the termination of the negotiations in March 2018 (see paras 72 & 77–78).

(5) The second till fifth defendants' argument that the success fee was no longer payable when PE terminated negotiations in March 2018 was misconceived and untenable. PE's termination of negotiations did not affect the rights and obligations of the contracting parties in the engagement letter. The terms under the engagement letter, which meant that the rights and obligations under the engagement letter, including the defendants' obligation to pay the success fee continued to subsist and continued to bind the defendants. Further, the engagement letter was not terminated as the defendants never terminated the engagement letter (see paras 80–81).

(6) The meaning and effect of the success fee clause, including the 'other term', was that after the termination of negotiations in March 2018 ie, the termination of PE's letter of intent of June 2017 to buy the defendants' majority shareholding in Alpha, even if the plaintiff did not continue to work and provide services up to the eventual completion, if the eventual completion of the transaction occurred within 24 months of the termination, the completion was deemed to be a completion which entitled the plaintiff to the agreed minimum success fee of RM2.75m plus 6% service tax. Applying this interpretation to the facts of this claim made it fair and just to hold that the plaintiff was entitled to the minimum success fee of RM2.75m, with the RM165,000 6% service tax, totalling RM2.915m, and the difference (see paras 82–83).

(7) The second till fifth defendants listed D1/Lim as their witness but decided not to call him to testify. This choice of not calling D1/Lim was a deliberate act which was not explained. The evidence that D1/Lim could have given on the facts surrounding the choice to consent to the recording of the consent judgment against him, would have substantively impacted the evidence produced in this suit. Nevertheless, it was not necessary for the court to hold whether to invoke a s 114(g) adverse inference against the second till fifth defendants for not calling D1/Lim to prove the second till fifth defendants 's assertion that it was the second till fifth defendants themselves who brought the transaction to completion ie, that the plaintiff did nothing to bring the transaction to completion. The success fee clause did not require proof of the fact that the plaintiff brought the transaction to completion before the second till fifth defendants were obligated to pay the plaintiff the success fee (see paras 94–96).

(8) The success fee clause provided that when PE terminated the negotiations, even if the plaintiff did not continue to bring the transaction to completion, as long as the transaction was somehow eventually completed within 24 months of the termination, the plaintiff was deemed to have brought about the completion of the transaction and was hence entitled to be paid the success fee (see para 97).

(9) The success fee clause was not ambiguous, which rendered the contra proferentum rule inapplicable to its interpretation. Further, the element of consideration in the engagement letter was present, namely, in consideration of the plaintiff providing their services to find the defendants a buyer for their majority shareholding in Alpha, and to advise the defendants on the transaction, and to work on the transaction, the plaintiff was to be remunerated with the milestone fee and the success fee. In any event, the defence that the success fee was without consideration was not a pleaded defence, and hence could not be relied on, or argued, by second till fifth defendants (see paras 104 & 106–107).

(10) The portion of cl 11(ii) that the second till fifth defendants complained about provided that the plaintiff would not commit the defendants to the terms of any transaction, or complete any transaction on the defendants' behalf, and that only the defendants were to make all the decisions for any transaction. Clause 14 provided that the plaintiff and defendants were not each other's agent, partner, fiduciary or representative, and they will not represent themselves as such. Also, the plaintiffs and defendants could not create any obligation on behalf of the other. These two clauses could not render the success fee clause unfair, unjust, unconscionable, void, unenforceable for want or failure of consideration, or rendered illegal for breach of the Accountants Act, the MIA By-Laws or the CMSA, or any other law (see paras 109–111).

(11) It was ordered, inter alia, that: (a) the second to fifth defendants were to jointly and severally pay the plaintiff RM2.915m (which was the agreed minimum success fee of RM2.75m + RM165,000 as 6% service tax); (b) the difference, if any, between the success fee calculated using the success fee formula and the RM2.75m minimum success fee plus the 6% service tax (difference); (c) less the RM517,740 which the first defendant had already paid; and (d) the parties were to appear before the judge to take directions for the assessment of the quantum of the difference under O 34 of the Rules of Court 2012. The plaintiff prayed for damages for breach of contract, but damages were not ordered since the second to fifth defendants were ordered to pay the plaintiff the minimum success fee and the difference (see para 128).

[Bahasa Malaysia summary

Defendan merupakan pemegang saham majoriti dalam syarikat mereka, Alpha Precision Turning and Engineering Sdn Bhd ('Alpha'). Mereka mahu menjual pegangan majoriti mereka dalam Alpha ('transaksi'). Oleh itu, mereka melantik plaintif untuk memberi nasihat kepada mereka dan mencarikan mereka pembeli. Kontrak antara plaintif dan defendan adalah surat pelantikan. Sebagai balasan terhadap kerja dan perkhidmatan plaintif, plaintif perlu dibayar fi pencapaian (yang tidak bergantung pada penyempurnaan transaksi)

dan fi kejayaan (yang bergantung pada penyempurnaan transaksi). Pada Ogos 2016, plaintif telah menghubungi Platinum Equity International Advisors Pte Ltd ('PE') untuk membeli saham defendan. Dari Ogos 2016 hingga Disember 2018, plaintif menjalankan dan menyediakan perkhidmatan untuk menyelesaikan transaksi. Walau bagaimanapun, rundingan dengan PE telah ditamatkan dua kali, sekali pada November 2017 dan sekali lagi pada Mac 2018. Tetapi, dalam kedua-dua keadaan, rundingan telah berjalan semula dan disambung selanjutnya dengan menjadi term sheet disemak terakhir yang telah diusahakan oleh plaintif, dan yang telah dimajukan kepada PE untuk dijawab. Sehingga Mei 2018, plaintif, bagi pihak defendan, memajukan maklumat kewangan terkini Alpha kepada PE, untuk melengkapkan transaksi. Selanjutnya setahun kemudian pada Mei 2019, plaintif mendapati bahawa urus niaga telah selesai dan defendan telah menjual pegangan saham majoriti mereka dalam Alpha kepada Compart: pelabur yang PE, yang plaintif dan defendan berniat (dan tahu) akan menjadi pembeli muktamad. Plaintif kemudiannya meneruskan tuntutan untuk fi kejayaan seperti yang dikontrakkan dalam surat perlantikan. Defendan pertama ('D1/Lim') menyelesaikan dengan plaintif dan merekodkan penghakiman persetujuan untuk membayar bahagiannya daripada tuntutan plaintif. Defendan kedua hingga kelima, bagaimanapun, membela terhadap tuntutan itu atas alasan bahawa: (a) surat perlantikan telah 'luput', dan klausa fi kejayaan minimum adalah 'tidak relevan', kerana fi kejayaan adalah bergantung pada penyempurnaan transaksi; (b) formula fi kejayaan telah 'luput dengan cara yang sama' dan 'tidak relevan' dengan tuntutan plaintif; (c) klausa fi kejayaan 'tiada kaitan atau hubungan dengan nilai kerja atau perkhidmatan yang diberikan' oleh plaintif, kerana PE menamatkan transaksi untuk kali kedua pada Mac 2018; (d) invois plaintif yang dikeluarkan pada September 2018 untuk fi pencapaian berjumlah RM203,520 telah dijelaskan sepenuhnya, dan sejak itu, tiada perkhidmatan telah diberikan untuk 'mewajarkan fi kejayaan'; (e) kebangkitan semula rundingan pada Disember 2018 adalah atas inisiatif PE dan bukan menurut surat perlantikan mahupun surat niat PE yang dikeluarkan pada Jun 2017; (f) surat perlantikan itu melanggar 'etika dan amalan profesional dan perniagaan', di bawah Akta Akauntan 1967 (Akta Akauntan), Undang-Undang Kecil (Mengenai Etika, Tingkah Laku dan Amalan Profesional) Institut Akauntan Malaysia ('Undang-undang Kecil MIA'), atau Akta Pasaran Modal Dan Perkhidmatan 2007 ('CMSA'). Dalam erti kata lain, syarat surat perlantikan adalah tidak sah; (g) tuntutan plaintif untuk fi kejayaan minimum RM2.915 juta (termasuk cukai perkhidmatan 6%) adalah 'tidak wajar dan menyinggung setiap prinsip undang-undang, profesional, perniagaan dan etika yang boleh difikirkan'. Isu-isu yang timbul untuk penentuan adalah: (i) sama ada pelupusan pegangan saham defendan dalam Alpha kepada Compart adalah berbangkit kepada pengenalan dan penglibatan plaintif; (ii) sama ada plaintif melaksanakan skop kerja yang dinyatakan dalam surat perlantikan, yang melayakkan plaintif mendapat fi kejayaan yang ditetapkan dalam surat perlantikan; (iii) sama ada tuntutan

plaintif untuk fi kejayaan adalah tidak adil, tidak wajar, tidak sah, tidak boleh dikuatkuasakan kerana ketiadaan atau kegagalan balasan, atau dilarang atau menyalahi undang-undang di bawah Akta Akauntan dan Undang-Undang Kecil MIA, atau peruntukan CMSA.

Diputuskan, membenarkan tuntutan:

(1) Pembelaan defendan kedua hingga kelima berhubung dengan isu pertama, iaitu pelupusan pegangan saham defendan dalam Alpha kepada Compart adalah berbangkit kepada pengenalan dan penglibatan plaintif, adalah salah arah. Keterangan mendedahkan bahawa plaintif telah melakukan kerja dan memberikan perkhidmatan kepada defendan sehingga menyediakan term sheet akhir yang disemak selanjutnya pada April 2018 dan kemudian memberikan data kewangan Alpha kepada PE yang dikemas kini pada Mei 2018. Terdapat hentian dalam rundingan untuk beberapa bulan, tetapi kemudian pada November 2018, D1/Lim bertemu semula dengan PE dan rundingan dihidupkan semula dan diteruskan. Pusingan akhir rundingan ini membawa kepada penyempurnaan transaksi dengan menandatangani perjanjian penjualan saham ('SSA') antara defendan dan Compart pada Mei 2019. Mengenai isu penegasan defendan kedua hingga kelima bahawa surat perlantikan telah luput, surat perlantikan itu tidak memperuntukkan supaya ia luput dengan berlalunya masa. Dalam erti kata lain, surat perlantikan tidak luput secara automatik selepas tempoh yang ditetapkan. Oleh itu, ianya tidak boleh dipertahankan bagi D2-D5 untuk menegaskan bahawa surat perlantikan telah luput (lihat perenggan 62–65).

(2) Sepertimana surat perlantikan tidak luput, surat perlantikan tidak pernah ditamatkan. Hak dan kewajipan pihak-pihak dalam kontrak itu wujud walaupun melebihi pengeluaran invois fi pencapaian plaintif pada September 2018. Dengan membayar jumlah invois, defendan sebenarnya mengakui kewajipan mereka di bawah surat perlantikan untuk membayar fi pencapaian di bawah surat perlantikan (lihat perenggan 66).

(3) Transaksi akhir yang dimasukkan dalam SSA antara defendan dan Compart pada dasarnya adalah transaksi yang sama yang telah diusahakan dan disempurnakan oleh plaintif. Dalam erti kata lain, transaksi, seperti yang ditakrifkan dalam surat perlantikan, telah selesai. Defendan menjual pegangan saham majoriti mereka dalam Alpha, dan Alpha memindahkan hartanahnya kepada syarikat lain supaya ia boleh dipajak semula kepada Compart. Rundingan pindahmilik hartanah ini adalah idea dan cadangan plaintif. Selanjutnya, transaksi SSA akhirnya yang dimeterai adalah hasil langsung daripada kerja dan perkhidmatan plaintif. Oleh itu, transaksi itu adalah berbangkit kepada pengenalan PE

oleh plaintif kepada defendan dan penglibatan mereka dalam menyediakan dan merundingkan terma transaksi (lihat perenggan 67–70).

(4) Mengenai hujah defendan kedua hingga kelima bahawa formula fi kejayaan telah luput, kerana surat perlantikan telah luput, mahkamah mendapati surat perlantikan tidak luput, dan surat perlantikan tidak ditamatkan. Syaratnya wujud. Dan formula fi kejayaan terpakai untuk mengikat defendan kepadanya. Keterangan mendedahkan bahawa plaintif terus melakukan kerja dan memberikan perkhidmatan kepada defendan walaupun selepas PE menamatkan rundingan untuk kali kedua pada Mac 2018. Oleh itu, plaintif telah melakukan kerja yang mencukupi dan memberikan perkhidmatan yang mencukupi yang membawa kepada iaitu, penyelesaian transaksi tersebut. Walau apa pun, hujah defendan kedua hingga kelima adalah bertentangan dengan tafsiran munasabah klausa fi kejayaan, termasuk 'terma lain', kerana terma fi kejayaan memperuntukkan bahawa plaintif berhak mendapat fi kejayaan walaupun plaintif tidak terus bekerja dengan defendan untuk menyelesaikan transaksi dengan jayanya, selagi penyelesaian muktamad transaksi berlaku dalam tempoh 24 bulan dari penamatan rundingan pada bulan Mac 2018 (lihat perenggan 72 & 77–78)

(5) Hujah defendan kedua hingga kelima bahawa fi kejayaan tidak lagi perlu dibayar apabila PE menamatkan rundingan pada Mac 2018 telah disalah anggap dan tidak boleh dipertahankan. Penamatan rundingan PE tidak menjejaskan hak dan kewajipan pihak yang berkontrak dalam surat perlantikan. Terma-terma di bawah surat perlantikan, yang bermaksud bahawa hak dan kewajipan di bawah surat perlantikan, termasuk kewajipan defendan untuk membayar fi kejayaan terus wujud dan terus mengikat defendan. Selanjutnya, surat perlantikan tidak ditamatkan kerana defendan tidak pernah menamatkan surat perlantikan (lihat perenggan 80–81).

(6) Maksud dan kesan klausa fi kejayaan, termasuk 'terma lain', ialah selepas penamatan rundingan pada Mac 2018 iaitu, penamatan surat niat PE pada Jun 2017 untuk membeli pegangan saham majoriti defendan dalam Alpha, malah jika plaintif tidak terus bekerja dan menyediakan perkhidmatan sehingga penyelesaian, jika penyelesaian transaksi berlaku dalam tempoh 24 bulan dari penamatan, penyelesaian itu disifatkan sebagai penyelesaian yang melayakkan plaintif mendapat fi kejayaan minimum yang dipersetujui sebanyak RM2.75 juta ditambah cukai perkhidmatan 6%. Menggunakan tafsiran ini kepada fakta tuntutan ini menjadikannya adil dan saksama untuk berpendapat bahawa plaintif berhak mendapat fi kejayaan minimum sebanyak RM2.75 juta, dengan cukai perkhidmatan 6% RM165,000, berjumlah RM2.915 juta, dan perbezaannya (lihat perenggan 82–83).

(7) Defendan kedua hingga kelima menyenaraikan D1/Lim sebagai saksi mereka tetapi memutuskan untuk tidak memanggilnya untuk memberi keterangan. Pilihan untuk tidak memanggil D1/Lim ini adalah tindakan yang disengajakan yang tidak dijelaskan. Keterangan yang boleh diberikan oleh D1/Lim mengenai fakta yang menyelubungi pilihan untuk bersetuju dengan rekod penghakiman persetujuan terhadapnya, akan memberi kesan secara substantif terhadap keterangan yang dikemukakan dalam saman ini. Walau bagaimanapun, mahkamah tidak perlu memutuskan sama ada untuk menggunakan anggapan bertentangan s 114(g) terhadap defendan kedua hingga kelima kerana tidak memanggil D1/Lim untuk membuktikan penegasan defendan kedua hingga kelima bahawa ia adalah yang defendan kedua hingga kelima sendiri yang menyelesaikan transaksi itu iaitu, bahawa plaintif tidak melakukan apa-apa untuk menyelesaikan transaksi itu. Klausa fi kejayaan tidak memerlukan bukti fakta bahawa plaintif telah menyelesaikan transaksi sebelum defendan kedua hingga kelima diwajibkan membayar plaintif fi kejayaan (lihat perenggan 94–96).

(8) Klausa fi kejayaan memperuntukkan bahawa apabila PE menamatkan rundingan, walaupun plaintif tidak meneruskan transaksi sehingga selesai, selagi transaksi itu akhirnya selesai dalam tempoh 24 bulan dari penamatan, plaintif dianggap telah membawa penyempurnaan urus niaga dan oleh itu berhak untuk dibayar fi kejayaan (lihat perenggan 97).

(9) Klausa fi kejayaan adalah jelas, yang menyebabkan peraturan contra proferentum tidak terpakai untuk tafsirannya. Selanjutnya, elemen balasan dalam surat perlantikan itu ada, iaitu, sebagai balasan plaintif memberikan perkhidmatan mereka untuk mencari defendan sebagai pembeli bagi pegangan saham majoriti mereka dalam Alpha, dan untuk menasihati defendan mengenai transaksi itu, dan untuk mengusahakan transaksi, plaintif akan dibayar dengan fi pencapaian dan fi kejayaan. Dalam apa jua keadaan, pembelaan bahawa fi kejayaan adalah tanpa balasan bukanlah pembelaan yang diplidkan, dan oleh itu tidak boleh dipakai, atau dipertikaikan, oleh defendan kedua hingga kelima (lihat perenggan 104 & 106–107).

(10) Bahagian klausa 11(ii) yang diadukan oleh defendan kedua hingga kelima dengan syarat plaintif tidak akan memberi komitmen kepada defendan kepada terma sebarang transaksi, atau menyelesaikan sebarang transaksi bagi pihak defendan, dan hanya defendan sahaja yang perlu membuat semua keputusan untuk sebarang transaksi. Klausa 14 memperuntukkan bahawa plaintif dan defendan bukanlah ejen, rakan kongsi, fidusiari atau wakil satu sama lain, dan mereka tidak akan mewakili diri mereka sendiri. Selain itu, plaintif dan defendan tidak boleh membuat sebarang obligasi bagi pihak yang lain. Kedua-dua

klausa ini tidak boleh menyebabkan klausa fi kejayaan tidak adil, tidak wajar, tidak sah, tidak boleh dikuatkuasakan kerana ketiadaan atau kegagalan balasan, atau dijadikan tidak sah kerana melanggar Akta Akauntan, Undang-undang Kecil MIA atau CMSA, atau mana-mana undang-undang lain (lihat perenggan 109–111).

(11) Ia telah diperintahkan, antara lain, bahawa: (a) defendan kedua hingga kelima hendaklah secara bersama dan berasingan membayar plaintif RM2.915 juta (iaitu fi kejayaan minimum yang dipersetujui sebanyak RM2.75 juta + RM165,000 sebagai 6% cukai perkhidmatan); (b) perbezaan, jika ada, antara fi kejayaan yang dikira menggunakan formula fi kejayaan dan fi kejayaan minimum RM2.75 juta ditambah cukai perkhidmatan 6% (perbezaan); (c) ditolak RM517,740 yang telah dibayar oleh defendan pertama; dan (d) pihak-pihak hendaklah hadir di hadapan hakim untuk mengambil arahan bagi taksiran kuantum perbezaan di bawah A 34 Kaedah-Kaedah Mahkamah 2012. Plaintif memohon ganti rugi bagi pelanggaran kontrak, tetapi ganti rugi tidak diperintahkan memandangkan defendan kedua hingga kelima telah diperintahkan untuk membayar plaintif fi kejayaan minimum dan perbezaannya (lihat perenggan 128).

Cases referred to

Marappan a/l Muthusamy v R Sivam a/l Ramasamy [2014] 4 MLJ 428; [2015] 1 MLRA 318 [2013] CLJU 1381, CA (refd)

Munusamy v PP [1987] 1 MLJ 492; [1987] 1 CLJ 250; [1986] 1 MLRA 292, SC (refd)

Legislation referred

Accountants Act 1967 s 10(a)
Capital Markets And Services Act 2007 ss 65(1)(g)(iv), 66(1)(b), 72(2)(b)(ii)
Evidence Act 1950 ss 103, 114(g)
Rules of Court 2012 O 34, O 37

Andrew Chiew (with R Shaleni, Chris Lim and Yen Hao) (Lee Hishammuddin Allen & Gledhill) for the plaintiff.
M Thayalan (with Chong Jun Min and Lim Khai Shin) (JA Yeoh) for the second, third, fourth and fifth defendants.

Kenneth St James JC:

PRELUSION

[1] The plaintiff ('P') entered into a type of consultancy or advisory agreement with the defendants ('Ds'). The contract was for P to assist and advise Ds to sell their shares in the company they owned.

[2] The contract contained a success fee clause. It is a term to pay P a contingency fee, if Ds get to sell their shares.

[3] P assisted and advised Ds. P worked on getting Ds' shares sold.

[4] Ds eventually completed the transaction to sell their shares to an ultimate buyer. But when P demanded for their success fee, Ds refused to pay. P filed this suit. When the suit was filed, only the first defendant paid up. The other defendants defended against the claim.

[5] Should P's claim against the other defendants for the success fee be allowed?

PRELIMINARIES

[6] The trial was conducted over nine days of evidence-gathering and submissions.

PLAINTIFF'S CLAIM

[7] Ds were the majority shareholders in their company: Alpha Precision Turning And Engineering Sdn Bhd ('Alpha'). They wanted to sell their majority stake in Alpha ('transaction'). They engaged P to advise them and to find them a buyer. They engaged P in June 2015 to work on the transaction.

[8] The contract between P and Ds is the engagement letter dated 22 June 2015 ('engagement letter'). In consideration of P's work and services, P was to be paid milestone fees (which did not depend on the completion of the transaction) and a success fee (which is dependent on the completion of the transaction).

[9] In August 2016, P approached Platinum Equity International Advisors Pte Ltd ('PE') to buy Ds' shares.

[10] From August 2016 until December 2018, P worked on and provided services to complete the transaction.

[11] The negotiations with PE were terminated twice — once in November 2017 and then again in March 2018. But in both instances, negotiations were revived and continued further. The negotiations culminated in a further revised final Term Sheet that P worked on, and which was forwarded to PE to respond to. Up until May 2018, P was, on Ds' behalf, forwarding updated financial information on Alpha to PE, to complete the transaction.

[12] Then a year later in May 2019, P discovered that the transaction was completed. Ds sold their majority shareholding in Alpha to Compart: the investor that PE, P and Ds intended (and knew) would be the ultimate buyer.

[13] P then proceeded to claim for the success fee as contracted for in the engagement letter.

[14] The first defendant ('D1/Lim') settled with P and recorded a consent judgment to pay his portion of P's claim. He paid RM517,704 to P under the consent judgment.

[15] P's prayers (claims) include:

(a) the second to fifth defendants ('D2-D5') are to jointly and severally pay P RM2.915m (which is the agreed minimum success fee + 6% service tax of RM165,000;

(b) the difference, if any, between the success fee calculated using the success fee formula, and the RM2.915m ('difference');

(c) less the RM517,740 that D1/Lim already paid;

(d) damages;

(e) the difference and damages, if the court decides so, are to be assessed by the Registrar under O 37 of the Rules of Court 2012 ('the ROC'), and if this assessment of damages prayer is allowed, then D2-D5 must deliver up to P all the documents relevant to the success fee, within 14 days from judgment date; and the parties are to appear before the Registrar within 21 days to take directions for the assessment of damages under O 34 of the ROC;

(f) D2-D5 are to jointly and severally pay interest at 5%pa on the amount of damages ordered to be paid from the date of the writ to the date of full payment;

(g) costs;

(h) interest on costs at 5%pa; and

(i) any other relief that this court deems fit and just.

D2-D5's DEFENCE

[16] D2-D5's defences, gleaned from D2-D5's summary of case are as follows:

(a) the engagement letter had 'lapsed', and the minimum success fee clause is 'irrelevant', since the success fee is contingent on the completion of the transaction;

(b) the success fee formula had 'similarly lapsed' and is 'irrelevant' to P's claim;

(c) the success fee clause had 'no relevance or correlation to the value of the work or services rendered' by P, as PE terminated the transaction for the second time in March 2018;

(d) P's invoice issued in September 2018 for the milestone fee amounting to RM203,520 was settled in full, and since then no services have been rendered to 'justify the success fee';

(e) the revival of negotiations in December 2018 was on PE's initiative and not pursuant to the engagement letter nor PE's letter of intent issued in June 2017.

(f) the engagement letter is in breach of 'professional and business ethics and practices', under the Accountants Act 1967 ('the Accountants Act'), the By-Laws (On Professional Ethics, Conduct And Practice) of the Malaysian Institute of Accountants issued in June 2019 ('MIA By-Laws'), or the Capital Markets And Services Act 2007 ('the CMSA'), or any relevant laws and regulations. In other words, the terms of the engagement letter are illegal; and

(g) P's claim for a minimum success fee of RM2.915m (which includes a 6% service tax) is 'unconscionable and offends every conceivable legal, professional, business and ethical principle'.

THE AGREED ISSUES TO BE TRIED

[17] Parties went to trial with the following three agreed issues to be tried ('ITBT') for this court to determine:

(a) whether the disposal of Ds' shareholdings in Alpha to Compart was consequential to P's introduction and involvement?

(b) whether P performed the scope of work set out in the engagement letter, which entitles P to the success fee prescribed in the engagement letter?

(c) whether P's claim for the success fee is unfair, unjust, unconscionable, void, unenforceable for want or failure of consideration, or prohibited or illegal under the Accountants Act and the MIA By-Laws, or the provisions of the CMSA, or any relevant laws and regulations?

A THE PIVOTAL TERMS OF THE ENGAGEMENT LETTER

[18] One — the engagement letter was addressed to Ds—D1/Lim, D2/Chuah, D3/Leong, D4/Eng and D5/Tan. They are the contracting parties with P. They are the persons who engaged P's services. They are the persons who B are obligated to P, and to whom P was obligated.

[19] It must be noted here that D2-D5's sole witness: Mr P'ng Hun Sun ('P'ng') was not a party to the contract. He did not engage P's services. He was not obligated to P, nor was P obligated to him. C

[20] What this means, evidentially, is that D2-D5's entire defence rests on P'ng's evidence, and the documentary evidence he produced at trial.

D **[21]** Two — cl 1 provides that P would act for Ds 'as a body rather than individually'. I take this to mean that P would act for Ds as one person, rather than five individuals. This is substantiated in the term that provides that P will take their instructions in the form of their collective decisions, which will be conveyed to P solely by D1/Lim. In other words, in the contract between P and E Ds, D1/Lim represented Ds, as P's counterparty.

[22] Three — cl 1 also defines the transaction under the engagement letter to include the sale of Ds' majority shareholdings in Alpha.

F **[23]** Four — cl 5: 'Fees And Expenses' provides that the fee structure has two elements: a milestone fee and a success fee. The milestone fee is payable whether or not the transaction is completed. The milestone fee has two components: (i) RM50,000 upon the receipt of an indicative offer or upon the G signing of a term sheet; and (ii) RM100,000 upon the receipt of a final offer. The obligation to pay the milestone fee is not in dispute.

[24] Unlike the milestone fee, the success fee (which is the element in dispute) is contingent on the completion of the transaction. The quantum of H the success fee is to be calculated from a formula that contains financial terminology like Gross Equity Value and Alpha's Recurring EBITDA for the financial year of 2014.

[25] Nevertheless, to give certainty to the quantum of the success fee, P and I Ds agreed that P will be paid a minimum success fee of RM2.75m (not including a 6% service tax amount).

[26] Five — cl 5 also provides, under the sub-heading of 'Other', a term in these words:

> *If we do not continue to work together to a successful completion, but you [ie Ds] subsequently complete the transaction within 24 months of termination of this agreement with any party previously approached by ourselves*, either directly or indirectly, *or with whom discussions were held* during the term of this engagement letter (as advised to you in writing), *we would consider this to be a successful completion and a fee would be payable to us on the same basis as if we had continued.*

[27] I will refer to this clause as the 'Other term'.

[28] It is obvious that this 'Other term' was included in the engagement letter to safeguard P's position in a rather envisageable (conceivable) circumstance — P worked on finding a buyer for Ds' shares; terms are discussed; terms are agreed on; draft agreements are prepared, but did not end up getting signed for some reason or other; but sometime later, Ds somehow ended up selling their shares to one of the parties whom P approached and discussed the transaction with — then a fee is payable *as if* P worked on the transaction until completion.

[29] And that fee could only be interpreted as the success fee, because:

(a) it is the fee that is payable on the same basis as if P had continued to work on the transaction to completion; and

(b) it is the fee payable that is contingent on the completion of the transaction.

[30] It is a safeguard for P because if the transaction does not go to completion for some reason or another, but later, also for some reason or another, the negotiation gets revived — and this time it leads to completion — then P still secures their success fee; P still gets paid the success fee.

[31] It is also a safeguard because if the transaction does not get to completion because of some objectionable (improper) intention on the part of any of the contracting parties in the transaction, namely either the intended buyer or any of Ds, to intentionally terminate the negotiations when it is close to completion, to avoid having to pay P their substantial success fee — this 'Other term' will secure the payment of the success fee.

[32] To put it in another way, P's work and services may have put all the legal terms and mechanisms and agreed particulars in place — for the transaction to be completed. P is not a contracting party in the transaction. The parties to the transaction, however, could terminate negotiations, and later resume negotiations to completion, but this time side-lining P from being involved in completing the transaction, perhaps rationalising that P's services are no longer required.

[33] It is a safeguard for P also because this 'Other term' provides that if the parties have in their minds to carry out such plans alluded to above — whatever may be the intention or purpose — then they have to wait for two years (the 24-month period stated in the 'Other term') to pass before they revive negotiations to bring the transaction to a successful completion. Only then will Ds' obligation to pay P the success fee lapse.

[34] Six — cl 9: 'Agreement To The Terms', is thus worded:

> If, having considered the provisions of this engagement letter you [ie Ds] conclude that they are *reasonable* in the context of all the factors relating to the engagement and our proposed appointment and you wish to engage us on these terms, please confirm your written acceptance of this engagement letter by signing and returning the attached copy.

[35] Each defendant signed their acceptance. This means, at the very least, that each defendant agreed that *every term* of the engagement letter is *reasonable*, and hence accepted the terms. And each defendant agreed to engage P on these terms.

FIRST ISSUE TO BE TRIED: WHETHER THE SALE OF Ds' SHARES IN ALPHA TO COMPART WAS CONSEQUENTIAL TO (A RESULT OF) P'S INTRODUCTION AND INVOLVEMENT?

The evidence

[36] This issue is an issue of fact. I analysed the evidence. I summarise below, in chronological sequence, the evidence of *some* of P's pertinent work and services for the transaction.

[37] June 2015 — P issued the engagement letter. Ds signed it and accepted the terms in the engagement letter, without qualification.

[38] In August 2016:

(a) P introduced and promoted the transaction to PE; and

(b) P procured the signing of a non-disclosure agreement ('NDA') between PE and Alpha.

[39] In September 2016:

(a) P prepared and issued a 49-page information memorandum to PE, together with a process letter to ask PE for an indicative offer.

[40] In October 2016:

(a) P set up a visit by PE to Alpha's plant. During this visit, PE met D1/Lim. In the meeting, Alpha presented a slide show and introductory documents were exchanged.

[41] In June 2017:

(a) PE issued its letter of intent to purchase up to 80% of the shareholdings in Alpha. All Ds, through D1/Lim, accepted PE's offer; and

(b) P issued the process letter which set out the timeline for due diligence and other matters that needed to be done. P gave PE access to Alpha's financial data and other documents for this purpose.

[42] In July 2017:

(a) P engaged, had meetings with, and worked with Crowe Horwath on the tax issues relating to the transaction;

(b) P worked with PE on the due diligence exercise; and

(c) P set up a site visit for PE to visit Alpha's plant again.

[43] In August 2017:

(a) P arranged for D1/Lim to visit Compart's plant in Shenzen, China.

(b) PE agreed to extend the deadline for exclusive negotiations on the transaction from September 2017 to November 2017.

[44] In September 2017:

(a) P sent to D1/Lim the draft share sale agreement ('SSA') between Ds and Compart;

(b) P held a meeting with Ds (with D1/Lim attending) to discuss the terms of the draft SSA;

(c) P reviewed the draft SSA with PE;

(d) P sent to Ds the key terms and issues arising from the review of the draft SSA with PE;

(e) P had several discussions with Crowe Horwath arising from Crowe Horwath's report on tax issues;

(f) P emailed to D2/Chuah the presentation slides presented at the September 2017 meeting and the draft SSA; and

(g) P worked on engaging Crowe Horwath for a new scope of work concerning the transaction.

[45] In October 2017:

(a) P accompanied D1/Lim (to advise Ds) at a meeting in Singapore with PE to discuss the draft SSA. Before the meeting, P had a discussion with D1/Lim to prepare for the meeting;

(b) P prepared and sent to PE a list of the updated issues arising from the meeting, containing P's advice; and

(c) P prepared and sent to PE the revised draft SSA.

[46] In November 2017:

(a) P perused Crowe Horwath's tax report from its new scope of work;

(b) PE terminated negotiations and withdrew its proposal to buy Ds' shares;

(c) P sent to D2/Chuah an analysis of the proposals that arose from the meeting. D2/Chuah responded to P with his comments. P in turn responded to D2/Chuah with their comments; and

(d) P had a discussion with D2/Chuah on suggestions to make to PE.

[47] In December 2017:

(a) P advised D2/Chuah on counter-proposals to make to PE. D2/Chuah informed P that he would take P's advice to the other Ds;

(b) P spoke with D2/Chuah and confirmed in writing Ds' counter-proposals.

(c) P sent to PE Ds' latest counter-proposals;

(d) PE rejected Ds' counter-proposals. P informed Ds.

(e) P held further discussions with PE;

(f) PE gave their comments on Ds' counter-proposals. P forwarded to Ds PE's comments, with P's analysis of PE's comments; and

(g) P sent to PE updated calculations. P had discussions with PE about the updated calculations. P gave D2/Chuah the updated calculations and their analysis of the calculations.

[48] In January 2018:

(a) PE asked about Alpha's management accounts and cash flow statements. P responded to PE. P gave PE Alpha's latest calculations;

(b) P gave D2/Chuah and D2's wife (Ng Foo Lang) the workings concerning the net proceeds and shareholder benefits;

(c) P informed PE about Ds' further counter-proposal and gave PE a deal structure, with illustrative calculations; and

(d) PE informed P that besides D1/Lim, PE did not want any of the other shareholders (the *other* Ds) to retain a shareholding stake in Alpha. Or the deal will not go through. This was a key issue at the time.

[49] In February 2018:

(a) P sent to D2's wife a breakdown of the estimated professional fees, taxes and such expenses relating to the transaction'

(b) After a discussion with D1/Lim, P sent to D1/Lim P's Project Spring (the codename of the transaction) Status Report dated February 2018 for D1/Lim's perusal. P also sent the Status Report to D2/Chuah and to P'ng (who is D4/Eng's husband); and

(c) note: In February 2018, P issued a status report that summarised that P reviewed over 500 potential investors (regionally and globally); approached 83 investors (62 of which declined to invest, and 21 signed NDAs and received the information memorandum); 15 did not submit further after receiving the information memorandum, but there were six interested investors; five made indicative offers and discussed pricing; and one who made a final offer, which was PE. These statistics were not unsubstantiated numbers. P named and listed these investors in the report. Also, in cross-examination, P'ng agreed that P performed all this work.

[50] In March 2018:

(a) at her request, P sent to D2's wife the tax issues relating to the property-carve-out exercise;

(b) at Ds' instructions, P sent to PE the Term Sheet. PE commented on the Term Sheet. P sent to Ds PE's comments;

(c) PE terminated the negotiations again and demanded that the expenses they had spent be paid to them;

(d) as PE did not agree to certain terms in the Term Sheet, Ds asked P to revise the Term Sheet to send it to PE;

(e) P informed Ds that PE was also claiming the expenses PE spent;

(f) after further discussion, P sent to Ds the draft revised Term Sheet. D1/Lim gave his approval for the draft revised Term Sheet and instructed P to proceed to send it to PE for them to consider. P sent to PE the revised Term Sheet;

(g) PE informed P that they may be willing to continue negotiations if Ds reimbursed PE's expenses incurred up to their earlier termination of negotiations (in November 2017). PE indicated that this is because Ds' revised terms deviated from the original intent of the parties; and

(h) P prepared and sent to Ds further revisions of the Term Sheet for their approval. D2/Chuah sought clarification from P. D4/Eng's son: Kenny P'ng informed P that he, on behalf of his mother: D4/Eng agreed to the further revised Term Sheet.

[51] In April 2018:

(a) P sent the further revised final Term Sheet to PE;

(b) P set up another meeting with PE. P met PE on 3 April 2018;

(c) D2/Chuah asked for an update, and P informed him that P is waiting for PE to comment on the further revised final Term Sheet. P followed up with PE for their response to the further revised final Term Sheet. PE replied to say that they needed certain updated numbers before they could respond; and

(d) P informed D2/Chuah on the various fees for the property-carve-out exercise.

[52] In May 2018:

(a) P sent to PE the financial updates on Alpha; and

(b) P continued to work on the transaction — by following up with PE and by looking for other potential investors.

[53] In June 2018:

(a) PE's solicitors verified that PE reached an agreement with Alpha to settle PE's claim for the reimbursement of PE's expenses incurred in negotiating the transaction.

[54] In September 2018:

(a) P issued to Alpha its invoice for RM203,520.

[55] In October 2018:

(a) Ds paid P RM67,840 as the first instalment towards P's invoice.

[56] In November 2018:

(a) D1/Lim had a meeting with PE;

(b) Ds paid another RM67,840 as the second instalment towards P's invoice; and

(c) PE emailed D1/Lim saying that PE is 'keen to re-engage' with Ds to see if they can 'bring this deal to a successful close in the next month or so'. PE also set out their 'proposal based on the principles' that they discussed.

[57] In December 2018:

(a) D1/Lim had a discussion with PE. D1/Lim sent an email to PE to confirm the points of the discussion; and

(b) Ds paid another RM67,840 as the third and final instalment towards P's invoice.

[58] In January 2019:

(a) PE sent to D1/Lim a final version of the Term Sheet, containing the agreed terms, ready to be signed. D1/Lim immediately forwarded the final Term Sheet to the other Ds; and

(b) D1/Lim had discussions on some revisions to the final Term Sheet. PE forwarded the revised final Term Sheet to Ds for them to sign.

[59] In May 2019:

(a) Ds reimbursed PE for the expenses they incurred;

(b) Ds and Compart entered into the SSA, completing the transaction. And so, Ds sold and transferred their majority shareholdings in Alpha to Compart. The transaction was completed; and

(c) PE announced through a press release that Compart had acquired Alpha.

[60] In September 2019:

(a) P contacted Ds to discuss the success fee payable under the engagement letter. Ds did not respond favourably.

[61] In October 2019:

(a) P demanded for the Minimum success fee payable with a 6% service tax, amounting to RM2.915m; and

(b) D1/Lim agreed to a consent judgment to be recorded against him to pay P RM517,740 as full and final settlement of his portion of the fees due to P under the engagement letter.

Dealing with D2-D5's defences which are pertinent to this first issue

[62] I have set out the pertinent facts that are, to me, proven by the evidence on the balance of probabilities. In the light of all this evidence, I am of the view that D2-D5's defences in relation to this first issue are misplaced.

[63] First — the evidence discloses that P had performed work and rendered services to Ds right up to preparing the further revised final Term Sheet in April 2018 and then giving to PE Alpha's updated financial data in May 2018.

[64] There was a pause in the negotiations for a few months, as there was no response in writing from PE from June to October 2018. Then in November 2018, D1/Lim met again with PE and negotiations revived and continued. This final round of negotiations led to the completion of the transaction by the signing of the SSA between Ds and Compart in May 2019.

[65] Second — contrary to D2-D5's assertion that the engagement letter (which was the contract between Ds and P) had lapsed, I find that the engagement letter had not lapsed. The engagement letter did not provide for it to lapse by an effluxion of time. In other words, the engagement letter does not automatically lapse after a specified period. It is untenable for D2-D5 to assert that the engagement letter had lapsed.

[66] Third — just as the engagement letter had not lapsed, the engagement letter was never terminated. The rights and obligations of the parties to the contract (Ds and P) subsisted. They subsisted even beyond P's issuance of its milestone fee invoice in September 2018. By paying the invoiced amount, Ds in fact acknowledged their obligation under the engagement letter to pay the milestone fee under the engagement letter. The milestone fee had to be paid irrespective of whether the transaction was completed or not. Ds, through Alpha, paid P's invoice without objection and without qualification.

[67] Fourth — in the cross-examination of P'ng, he admitted that the eventual transaction captured by the SSA between Ds and Compart (signed in May 2019) was *essentially the same transaction* that was worked on and put together by P. In other words, the transaction, as defined in the engagement letter, was completed.

[68] Ds sold their majority shareholdings in Alpha, and Alpha transferred its real property to another company so that it could be leased back to Compart (this is the property-carve-out exercise referred to earlier). This property-carve-out exercise was P's idea. P suggested it.

[69] Fifth — the eventual SSA transaction that was entered into was a direct result of (was a culmination of) P's work and services. In the Cross-examination of P'ng, he admitted that Ds and Compart used P's work product for the SSA between them. DW1 was asked: 'You basically relied on all the work product that was done by P to continue negotiations. Agreed?'. DW1 answered: 'Yes, we used that, yes, because the financial data is the same.'

Conclusion

[70] I therefore find that the transaction (the sale of Ds' majority shareholding in Alpha to Compart) was consequential to (the result of) P's introduction of PE to Ds and their involvement in preparing and negotiating the terms of the transaction.

SECOND ISSUE TO BE TRIED: WHETHER P PERFORMED THE WORK SET OUT IN THE ENGAGEMENT LETTER WHICH ENTITLES P TO THE SUCCESS FEE?

[71] The pivotal and pertinent terms of the engagement letter relating to the success fee are already set out above. So is the pertinent evidence.

Dealing with D2-D5's arguments on this issue

[72] One — D2-D5 argue that the success fee formula had lapsed, because the engagement letter had lapsed. I have found (above) that the engagement letter had not lapsed, and the engagement letter was not terminated. Its terms subsisted. And so I find that the success fee Formula is applicable to bind Ds to it.

[73] Relatedly, P claims the application of the success fee formula for what is defined as the difference — the difference, if any, between the calculated using the success fee Formula and the RM2.75m minimum success fee plus a 6% service tax. This claim for the difference requires the application of the success fee formula. And the success fee Formula in turn requires the input of components such as Alpha's Gross Equity Value and its Recurring EBITDA for the financial year 2014, which are particulars that are not before the court, or not made available to the court.

[74] P demanded for the particulars of these components, but Ds did not give them to P. Nevertheless, P prays for the difference to be assessed by the court.

[75] Two — D2-D5 argue that the success fee clause had no relevance or correlation to the *value* of the work and services P rendered to Ds, because PE

terminated the transaction for the second time in March 2018. But the evidence discloses that even after PE terminated the transaction for the second time in March 2018 — negotiations continued and P continued to perform work and render services to Ds. P's work and services culminated in preparing the further revised final Term Sheet and the providing of Alpha's updated financial data to PE. So, I find that D2-D5's argument here is untenable.

[76] Three — D2-D5 argue that Ds have paid P the milestone fee, and that is enough. D2-D5 argue that P has done no work or rendered services to justify the success fee. I find this argument untenable as well. This argument is contrary to the evidence, and contrary to a reasonable interpretation of the meaning and effect of the success fee clause, including the 'Other term'.

[77] It is contrary to the evidence because (and I reiterate) the evidence discloses that P continued to perform work and render services to Ds even after PE terminated negotiations for the second time in March 2018. And I find that P had performed sufficient work and rendered sufficient services that led to ie resulted in the completion of the transaction.

[78] In any event, D2-D5's argument is contrary to a reasonable interpretation of the success fee clause, including the 'Other term', because the success fee term provides that P is entitled to the success fee *even if* P does not continue to work with Ds to a successful completion of the transaction, as long as the ultimate completion of the transaction takes place within 24 months of the termination of the negotiations in March 2018.

[79] Four — from the time of the November 2018 meeting between D1/Lim and PE, which revived again the negotiations based on the further revised final Term Sheet prepared by P — P was kept out of the negotiations. The communication was only between D1/Lim and PE. Some communication was forwarded to D2-D5 and P'ng. But no communication at all was forwarded to P. P was no longer copied on the communication.

[80] Five — D2-D5 argue that the success fee was no longer payable when PE terminated negotiations in March 2018. This argument is misconceived and untenable. PE's termination of negotiations did not affect the rights and obligations of the contracting parties in the engagement letter (the contracting parties being Ds and P). The terms under the engagement letter — which mean the rights and obligations under the engagement letter, including Ds' obligation to pay the success fee — continue to subsist and continue to bind Ds.

[81] Further, I reiterate that the engagement letter was not terminated. Ds never terminated the engagement letter.

Conclusion

[82] I find that the meaning and effect of the success fee clause, including the 'Other term', is that after the termination of negotiations in March 2018 ie the termination of PE's letter of intent of June 2017 to buy Ds' majority shareholding in Alpha, even if P did not continue to work and provide services up to the eventual completion, if the eventual completion of the transaction occurs within 24 months of the termination, the completion is deemed to be a completion which entitles P to the agreed Minimum success fee of RM2.75m plus 6% service tax.

[83] And that is what happened here. Applying this interpretation to the facts of this claim makes it fair and just to hold that P is entitled to the Minimum success fee of RM2.75m, with the RM165,000 6% service tax, totalling RM2.915m, and the difference.

Adverse inference arguments

[84] At this juncture, for completeness, it is timely to analyse the s 114(g) Evidence Act 1950 adverse inference submissions mounted by both sides.

[85] P asserts that the s 114(g) adverse inference should apply against D2-D5. The argument is that none of Ds, in particular D1/Lim, was called to testify for D2-D5. D1/Lim is the best witness who can testify about the continuation of negotiations after PE terminated negotiations for the second time in March 2018. He is the shareholder who met with PE in November 2018 and communicated with PE to further revise the further revised final Term Sheet prepared by P.

[86] D2-D5 had initially subpoenaed D1/Lim to testify but later chose not to call him to testify.

[87] Instead, D2-D5 called only P'ng to testify and chose to rely solely on his evidence to prove their defence. But P'ng is not a defendant in this suit. He is not a shareholder who sold his shares in Alpha to Compart. He does not have personal knowledge as to what transpired when the negotiations were revived and continued even after PE terminated negotiations for the second time in March 2018, which eventually led to the completion of the transaction. His testimony about what transpired, particularly about what D1/Lim may have told him, tantamounts to hearsay evidence because D1/Lim was not called to testify about those facts.

[88] D2-D5 assert that after PE terminated negotiations for the second time in March 2018, they (D2-D5) brought the transaction to completion

themselves, not P. In other words, P did nothing to bring the transaction to completion, and so should not be paid the success fee for it. Since they assert this fact, it is trite law that D2-D5 must prove this fact. He or she who asserts a fact has the burden to prove that fact — s 103 of the Evidence Act 1950.

[89] Section 103 is set out below for reference:

> Section 103. Burden of proof as to particular fact.
>
> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> *ILLUSTRATIONS*
>
> (a) *A* prosecutes *B* for theft and wishes the court to believe that *B* admitted the theft to *C*. *A* must prove the admission.
>
> (b) *B* wishes the court to believe that at the time in question he was elsewhere. He must prove it.

[90] A s 114(g) adverse inference can be drawn against a party for 'non-production of not just any witness but an important and material witness to the case' — *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; [1987] 1 CLJ 250; [1986] 1 MLRA 292 (E128, p 131) (SC).

[91] *Munusamy* also stands for the proposition that the evidence that is referred to in s 114(g) must not only be relevant, it must be material. In other words, for the s 114(g) adverse inference to be drawn against a party, the adverse evidence must be both relevant and material.

[92] D1/Lim is indeed an important and material witness to the revival and continuation of the negotiations that eventually took the transaction to completion. His evidence is not only relevant and material, but pivotal.

[93] Also, an adverse inference is drawn only if there is a deliberate withholding of the evidence. A deliberate withholding of the evidence is inferred if there is no reasonable explanation for not calling a material witness to testify — *Marappan a/l Muthusamy v R Sivam a/l Ramasamy* [2014] 4 MLJ 428; [2015] 1 MLRA 318 [2013] CLJU 1381 (CA).

[94] D2-D5 listed D1/Lim as their witness but decided not to call him to testify. This choice of not calling D1/Lim is a deliberate act. This deliberate act was not explained

[95] I am also mindful that D1/Lim consented to a judgment to be entered against him for an agreed portion of P's claim. The evidence that he could have

given on the facts surrounding this choice to consent to the recording of the consent judgment against him, would have substantively impacted the evidence produced in this suit.

[96] Nevertheless, I find that it is not necessary for me to hold whether to invoke a s 114(g) adverse inference against D2-D5 for not calling D1/Lim to prove D2-D5's assertion that it was D2-D5 themselves who brought the transaction to completion ie that P did nothing to bring the transaction to completion. The success fee clause does not require proof of the fact that P brought the transaction to completion before D2-D5 are obligated to pay P the success fee.

[97] On the contrary, the success fee clause provides for the opposite. The success fee clause provides that when PE terminates the negotiations, even if P does not continue to bring the transaction to completion, as long as the transaction was somehow eventually completed within 24 months of the termination — P is deemed to have brought about the completion of the transaction and is hence entitled to be paid the success fee.

[98] Put differently, the way that the success fee clause is worded, and on my interpretation of the clause — when there is a termination of the negotiations, even when P did not continue to work on the negotiations to achieve completion of the transaction, P is nonetheless entitled to the success fee.

THIRD ISSUE TO BE TRIED: WHETHER P's CLAIM FOR THE SUCCESS FEE IS UNFAIR, UNJUST, UNCONSCIONABLE, VOID, UNENFORCEABLE FOR WANT OR FAILURE OF CONSIDERATION, OR PROHIBITED OR ILLEGAL UNDER THE ACCOUNTANTS ACT, THE MIA BY-LAWS, OR THE CMSA, AND ANY RELEVANT LAWS AND REGULATIONS?

[99] This is a summary of D2-D5's defence under this third ITBT:

(a) to charge a success fee such as the one under the engagement letter is a breach of 'professional and business ethics and practices', under the Accountants Act, the MIA By-Laws, or the CMSA or any relevant laws and regulations ie the terms in the engagement letter are illegal; and

(b) P's claim for a minimum success fee of RM2.915m (which includes a 6% service tax) is 'unconscionable and offends every conceivable legal, professional, business and ethical principle'.

Dealing with D2-D5's arguments on this issue

[100] One — D2-D5 argue that the success fee clause does not (using D2-D5's words in their written submissions) 'speak of a success fee' but merely that 'a fee would be payable to [P] on the same basis as if [P] had continued'. D2-D5 argue that the success fee clause is not about the success fee, because the fee structure in the engagement letter comprises two elements: the milestone fee and the success fee.

[101] I do not quite comprehend the rationale of this argument. It appears to be an argument against what is obvious. The fee 'payable to [P] on the same basis as if [P] had continued' — is obviously the success fee contemplated and agreed to under the success fee clause.

[102] The fee payable under the 'Other term' is similarly obviously the success fee payable to P. A restatement of the effect of the success fee clause is apt to be made here:(i) if P does not continue to work on the negotiations to the completion of the transaction, for instance where P's services are terminated, or for any other reason; and (ii) if the transaction is completed with any party P brought into the negotiations with Ds, or any party P had discussions with about the transaction; (iii) within 24 months of the termination of negotiations or termination of P's services — then Ds are in any event obligated to pay P the success fee as set out in the clause.

[103] Two — D2-D5 argue that the success fee clause is ambiguous. And an ambiguous clause should be interpreted in favour of D2-D5 due to the *contra proferentum* rule.

[104] The *contra proferentum* rule is a rule for the construction of the terms of a contract, which is applicable when the terms are ambiguous. I am of the view that the success fee clause is not ambiguous, which renders the *contra proferentum* rule inapplicable to its interpretation. This argument also falls.

[105] Third — D2-D5 argue that the success fee clause is (to quote D2-D5) 'without consideration'. It is without consideration because (to quote D2-D5 again) 'P had furnished no consideration whatsoever for the SSA' with Compart. The SSA with Compart was (to quote D2-D5 yet again) without P's 'involvement'.

[106] This argument is untenable. I find that the element of consideration in the engagement letter is present. In consideration of P providing their services to find Ds a buyer for their majority shareholding in Alpha, and to advise Ds on the transaction, and to work on the transaction — P is to be remunerated with the milestone fee (which is payable irrespective of the completion of the transaction) and the success fee (which is payable if the completion of the transaction happens within two years of P ceasing to work on the transaction).

[107] In any event, this defence — that the success fee is without consideration — is not a pleaded defence, and hence cannot be relied on, or argued, by D2-D5.

[108] Four — D2-D5 argue that the success fee clause (using D2-D5's words) is 'contrary to P's Terms Of Business For Corporate Finance', which are set out in the Appendix to the engagement letter, particularly cl 11(ii) and cl 14.

[109] The portion of cl 11(ii) that D2-D5 complain about provides that P will not commit Ds to the terms of any transaction, or complete any transaction on Ds' behalf, and that only Ds are to make all the decisions for any transaction.

[110] Clause 14 provides that P and Ds are not each other's agent, partner, fiduciary or representative, and they will not represent themselves as such. Also, P and Ds cannot create any obligation on behalf of the other.

[111] I do not see how these two clauses, which were agreed to by Ds, render the success fee clause unfair, unjust, unconscionable, void, unenforceable for want or failure of consideration, or rendered illegal for breach of the Accountants Act, the MIA By-Laws or the CMSA, or any other law.

[112] I find this argument entirely tangential.

[113] Five — Concerning Ds' argument that the terms of the engagement letter offend the Accountants Act — I find that D2-D5's only mention of the Accountants Act is s 10(a). Section 10(a) of the Accountants Act provides for the specific powers of the Malaysian Institute of Accountants' Council. Those powers include the power to make by-laws, such as the MIA's By-Laws (On Professional Ethics, Conduct And Practice).

[114] D2-D5 had not referred to the specific provisions of the Accountants Act that P is alleged to have offended. And so, I find that the Accountants Act is not pertinent or even relevant to the determination of this third issue.

[115] Six — Concerning Ds' argument that the terms of the engagement letter offend the MIA By-Laws — D2-D5, in their written submissions concede that P is *not* subject to the MIA By-Laws. There is therefore no need for me to analyse and consider whether the success fee clause breaches the MIA By-Laws.

[116] This argument is inapplicable for this third ITBT.

[117] Seven — Concerning Ds' argument that the terms of the engagement letter offend the CMSA — D2-D5 argue that P's activities are governed by the CMSA, and P has breached the provisions of the CMSA, particularly ss 65(1)(g)(iv), 66(1)(b) and 72(2)(b)(ii).

[118] Section 65(1)(g)(iv) of the CMSA provides that the Securities Commission ('SC') may refuse an application for a CMSA representative's licence if the applicant had 'engaged in any business practices' which appear to the SC to be 'deceitful or oppressive or otherwise improper (whether unlawful or not)' or 'which otherwise reflect discredit in his method of conducting business'.

[119] I find that this argument is insupportable, and actually irrelevant.

[120] Anyhow, there is no evidence, or even some material from which an inference can be drawn, that P — by contracting to be paid a success fee in the manner that it is expressed in the success fee clause and the 'Other term' — has done what is deceitful or oppressive or improper or discreditable.

[121] Section 66(1)(b) provides that the SC 'may inquire into any transaction' involving the purchase or sale of shares entered into or caused to be entered into by a CMSA-licenced entity such as P — to decide if P has used 'dishonest, unfair or unethical devices', and whether such devices are an offence under the CMSA.

[122] I also find that this argument is untenable, and impertinent.

[123] And again, there is no evidence, or even some material from which an inference can be drawn, that P used dishonest, unfair or unethical devices, and that the SC has decided that P's conduct is an offence under the CMSA.

[124] Section 72(2)(b)(ii) provides that the SC can revoke a licence if there is a ground under section 65(1) to refuse an application for a licence. In other words, if there is a reason to refuse an applicant a licence, the SC can revoke a licence already-granted for the same reason.

[125] Similarly, I find that this argument is impertinent and irrelevant.

[126] As such, I find that the success fee clause, read together with the 'Other term', or a success fee clause that is expressed in the manner that it is expressed in the engagement letter — does not offend the statute law that D2-D5 cite, and more specifically the provisions of the CMSA that D2-D5 cite.

[127] I therefore answer this third ITBT in the negative ie I find that the success fee clause is *not* unfair, unjust, unconscionable, void, unenforceable for want or failure of consideration, or that it should be rendered illegal for breach of the Accountants Act, the MIA By-Laws or the CMSA.

CONCLUSION

[128] For these reasons, I allow P's claim. It is my judgment that:

(a) D2-D5 are to jointly and severally pay P RM2.915m (which is the agreed minimum success fee of RM2.75m plus RM165,000 as 6% service tax;

(b) the difference, if any, between the success fee calculated using the success fee Formula and the RM2.75m minimum success fee plus the 6% service tax (*difference*);

(c) less the RM517,740 D1/Lim already paid;

(d) P prays for damages for breach of contract, but I do not order damages since I order D2-D5 to pay P the minimum success fee and the difference;

(e) the parties are to appear before the judge to take directions for the assessment of the quantum of the difference under O 34 of the ROC;

(f) note: The prayer that: 'the difference is to be assessed by the court under O 37 of the ROC, and for the purpose of this assessment, D2-D5 must deliver up to P all the documents relevant to the success fee, within 14 days from the judgment date (30 July 2024)' — is not ordered at this juncture because I am informed by D2-D5 that they are no longer in control of Alpha and hence cannot deliver these relevant documents in the manner prayed for;

(g) but I order that parties are at liberty to apply for further directions or orders;

(h) D2-D5 are to jointly and severally pay interest at 5%pa on the RM2.915m from the date of the writ to the date of full payment, and interest at 5%pa on the quantum assessed as the difference, from the date of the order quantifying the difference to the date of full payment; and

(i) costs of RM80,000 to be jointly and severally paid by D2-D5 to P by 30 September 2024. Costs are subject to the allocatur.

A *Claim allowed.*

Reported by K Selvaraju

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